

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICKY EDWARD BLOCK,)	
)	
Plaintiff)	
)	
v.)	Civil No. 97-0059-B
)	
CUMBERLAND COUNTY JAIL, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION

Pending before the Court is Plaintiff's Motion for Entry of Default and Default Judgment as to Defendant Phoebe Dixon, and Defendants Dixon and Prison Health Services' Motion to Remove Default and for Leave to File a Late Answer.¹ The Motions prompted the Court to review Plaintiff's claim as to these Defendants. On the basis of that review, the Court concludes that Plaintiff's Complaint fails to state a claim upon which relief can be granted in this Court against Defendants Dixon and Prison Health Services. Because Plaintiff is appearing in this action in forma pauperis, the Court may dismiss the action at any time upon determining that Plaintiff has failed to state a claim. 28 U.S.C. § 1915(e)(2).

In his Amended Complaint, filed September 5, 1997, Plaintiff alleges that a psychiatrist at the Cumberland County Jail refused to dispense to Plaintiff the exact medication he had been prescribed. Plaintiff asserts that a "nurse" explained to Plaintiff that officials at the Cumberland County Jail did not generally use that particular medication because it is expensive. The "nurse" was

¹ Plaintiff's Complaint names "Prison Health Services" as a Defendant. Defendant Dixon's identity was unknown to Plaintiff at the time he filed the Complaint. He now appears to be proceeding only as to Defendant Dixon, and has not made service of process on "Prison Health Services." In an effort to wrap up any loose ends that may have occurred in this matter, the Court will assume that Prison Health Services is an active Defendant.

later identified as Defendant Dixon, who was served with a summons and copy of Plaintiff's Complaint by the U.S. Marshal Service on January 5, 1998.

The difficulty with this claim is that Defendant Dixon is not alleged to have engaged in any behavior that could be considered deliberately indifferent to Plaintiff's serious medical need, as is required to state a medical claim under 42 U.S.C. section 1983. *Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). The most Plaintiff has alleged against Defendant Dixon is that she offered what Plaintiff considered to be an unsatisfactory answer to his inquiry about the change in his medication. Even if Defendant Dixon were responsible for making that change, and Plaintiff's Complaint does not so allege, "[t]he courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment." *Id.*

Plaintiff's claim against Defendant Dixon's employer, Prison Health Services, would necessarily be based on a theory of respondeat superior, which is not permitted in actions brought pursuant to section 1983. *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691 (1978). Further, Prison Health Services is not a "person" within the meaning of section 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (finding the same for the State Police).

Conclusion

For the foregoing reasons, I hereby recommend Plaintiff's Complaint be DISMISSED pursuant to 28 U.S.C. section 1915(e)(2) as to Defendants Dixon and Prison Health Services for Plaintiff's failure to state a claim upon which relief can be granted.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.